

STATE OF MICHIGAN
COURT OF APPEALS

RED RUN GOLF CLUB CORPORATION,

Plaintiff-Appellee,

v

DREW S. NORTON,

Defendant-Appellant.

UNPUBLISHED

June 20, 2006

No. 260008

Oakland Circuit Court

LC No. 03-054750-CK

Before: Kelly, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals by right the trial court's judgment against him and raises issues addressed in the trial court's order granting plaintiff summary disposition. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the trial court erred in concluding that there was no genuine issue of material fact about whether the parties modified the contract. We review de novo a trial court's decision on a motion for summary disposition. *Rose v Nat'l Auction Group*, 466 Mich 453, 461; 646 NW2d 455 (2002). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), we consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* Summary disposition is appropriately granted "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Parties to a contract possess the freedom to contract even after the original contract has been executed. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003). But, a party cannot unilaterally modify an existing agreement; rather, a party alleging contract modification must establish a mutual intention of the parties to modify the original contract. *Id.* at 372. "The mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract." *Id.* at 373.

The original contract required defendant to pay seven annual installments of \$5,250. The contract also allowed plaintiff to accelerate the payments upon defendant's default. Defendant submitted an affidavit in which he averred that in June 2003, plaintiff's general manager offered

him a one-year sabbatical, which defendant accepted. Defendant also submitted a letter he wrote to the general manager allegedly memorializing this agreement. Plaintiff acknowledges that it sometimes permits members in good standing to take a one-year sabbatical from their membership if their accounts are current. Plaintiff denied, however, that defendant was eligible for the sabbatical because his membership was not in good standing.

When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), this Court considers the affidavits and “other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion.” *Rose, supra* at 461. Defendant’s affidavit and letter constitute evidence of a mutual oral agreement to modify the contract. *Quality Products & Concepts, supra* at 372. Further, a trial court may not make findings of fact or determinations of credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). Therefore, the trial court erred in concluding that defendant failed to present evidence establishing a genuine issue of material fact about whether the parties modified the contract.

Nonetheless, we further note that defendant acknowledged in his affidavit that the alleged modification required him to pay his arrearages within one year. It is undisputed that defendant failed to pay his arrearages within one year, i.e., by June 30, 2004. Therefore, even if there were a genuine issue of material fact about whether plaintiff agreed to modify the contract, we conclude that summary disposition was appropriate because defendant still failed to perform under the modified contract.

We affirm.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter